Filed 4/10/09 P. v. Chavarria CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT CHAVARRIA, Defendant and Appellant.	A120442 (City and County of San Francisco Super. Ct. No. 202738)

Robert Chavarria appeals his conviction of auto burglary following a jury trial.

BACKGROUND

On September 4, 2007, Robert Chavarria was charged by information with second degree burglary of a vehicle belonging to Vicente Jimenez (Pen. Code, § 459[1]; count 1), and assault on Jimenez with force likely to cause great bodily injury (§ 245, subd. (a)(1); count 2). The information also contained a special allegation that he had served a prior prison term within the meaning of section 667.5, subdivision (b). Chavarria successfully moved to dismiss count 2 pursuant to section 995.

The burglary count was tried to a jury. According to Jimenez, on July 11, 2007, he parked his Dodge Dakota truck on Florida Street in San Francisco near his home. The truck was locked and its windows were intact. At about 7:00 the next morning, one of Jimenez's neighbors brought to his attention that someone had just broken into his truck. Jimenez approached the truck to witness Chavarria inside searching and removing items.

[1] All statutory references are to the Penal Code unless otherwise indicated.

The back window was broken and pieces of glass were in the bed of the truck and behind the seat inside the cab. Jimenez immediately dialed 911 on his cellular phone and reported the incident to the police. Chavarria exited the truck with several items in his hands, including a circular saw blade Jimenez used for his work. Jimenez asked Chavarria what he was doing and why he was taking the property. Chavarria raised his arm as if to try and hit Jimenez and the saw blade fell out of his hand. Chavarria then started running with Jimenez in pursuit, Jimenez all the while remaining on the cell phone with the police. After running about 10 blocks, the two arrived at the intersection of Cesar Chavez Avenue and Folsom Street on opposite sides of the street. Chavarria crossed the street, approached Jimenez, stated he would return the stolen property, and asked Jimenez not to call the police. Chavarria placed the property on top of a public garbage receptacle. At that moment, the police arrived.

San Francisco Police Officer Rey Vargas, responding to a dispatch, saw Jimenez waving him down in the vicinity of Cesar Chavez Avenue and Folsom Street. Jimenez identified Chavarria as the person who broke into his vehicle. After two other officers arrived to assist in the investigation, Vargas accompanied Jimenez to the location of his truck to notice that the rear window had been broken and shattered glass was both in the bed and cab of the truck. A saw blade was retrieved from the sidewalk near the truck.

San Francisco Police Officer Kunthea Johnson was one of the officers who responded to the intersection of Cesar Chavez Avenue and Folsom Street on the morning of July 12, 2007. Chavarria had already been detained by Vargas and another officer. Johnson testified that she recovered a cell phone charger and package of light bulbs from Chavarria's front pants pocket, items that belonged to Jimenez and had been in his truck. Johnson and Vargas saw a tape measure and pair of gloves on top of a garbage receptacle at the intersection. These items were identified as having come from the truck.

Chavarria testified at trial. He told the jury he took the bus from San Mateo to San

Francisco on the evening of July 11, 2007.[2] He intended to seek work from Pepe, a friend who had hired him to do landscaping, painting, carpentry and welding work on and off over the previous six months. Pepe lived on the same block of Florida Street as Jimenez. When Chavarria showed up at Pepe's house, Pepe "wasn't too thrilled" to see him and told him he was fired. Chavarria left Pepe's home and tried to panhandle money in the area for about an hour, but he did not collect enough for a bus ticket back to San Mateo. He returned to Pepe's house and Pepe again refused him work and asked him not to return. It was then about 11:00 p.m. Around midnight, Chavarria entered Jimenez's truck through the rear window and slept in the truck. He entered the truck with the intent to sleep there, not with the intent to steal anything. When Chavarria awoke he thought about how he was going to "make a few dollars to get home." He took some items from the truck, including the saw blade, the cell phone charger and the package of light bulbs. He did not take the stereo in the truck because "I didn't want to break the law again." Chavarria offered that he had suffered a 2006 felony conviction for auto burglary in San Francisco. According to Chavarria, the rear window of Jimenez's truck was already broken. The window area had been covered with a piece of plastic, which Chavarria "popped out" to enter the cab of the truck.

In closing argument, defense counsel acknowledged that Chavarria had committed the lesser-included offense of vehicle tampering, but that his client did not have the requisite specific intent for the crime of burglary: an intent to steal at the time he entered the vehicle. The jury returned a verdict of guilty on the charge of second degree burglary.

Chavarria admitted the prison term prior conviction allegation, and he was sentenced to the upper term of three years for burglary plus one year on the special allegation for a total of four years in state prison.

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[2] Chavarria initially testified that he went to San Francisco to seek work from Pepe on July 12, 2007, but this appears to be a misstatement that was later corrected on cross-examination. Jimenez testified that the truck break-in occurred sometime between the evening of July 11 and the morning of July 12, 2007.

DISCUSSION

I. Reasonable Doubt

Chavarria first maintains the trial court erred by failing to define reasonable doubt or mention the presumption of innocence in its instructions to the jury after the close of evidence and before the commencement of jury deliberations.

The test we apply is set forth in *Victor v. Nebraska* (1994) 511 U.S. 1, 5: "The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. [Citation.] Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, [citation], the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. [Citation.] Rather, 'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.' "

Under state law, "[i]n charging a jury, the court may read to the jury Section 1096, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given." (§ 1096a.) Section 1096 contains the meaning of reasonable doubt and explains that a defendant is presumed innocent until proven guilty. Two standard CALCRIM jury instructions substantially track the language of section 1096: CALCRIM No. 103, which is designed to be given during voir dire or before testimony begins, and CALCRIM No. 220, which is designed to be given after the close of evidence and before jury deliberations. (Judicial Council of California California Criminal Jury Instructions (2008), CALCRIM No. 103, Bench Notes, Commentary and heading ("Pretrial"), pp. 10-11; CALCRIM No. 220, Commentary and heading ("Post-Trial: Introductory"), p. 44.) Chavarria does not dispute that these instructions adequately explain the meaning of reasonable doubt.

Chavarria asked the court to instruct the jury with both CALCRIM Nos. 103 and 220. The trial court read CALCRIM No. 103 to the sworn jury before the prosecutor's

opening statement. At the time, jurors were also given a packet of written instructions and were instructed to "follow along on your own set of instructions as I read them to you." At the end of the first day of trial, the court ordered jurors to "leave your notebooks and your instructions behind" when they left the courtroom. At the beginning of the next day, the court explained, "The next step in the trial . . . will be for me to read to you the instructions stating the law that applies to this case . . . . [¶] . . . Each of you have a copy of these instructions to refer to during the attorneys' arguments and to use in the jury room. [¶] . . . [¶] Please pay careful attention to all of these instructions and consider them together. If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it." CALCRIM No. 220 was not included in these particular instructions. Following closing arguments, the court gave a few additional instructions and told the jury to "take your instructions and your notebooks with you. The bailiff will show you the way to the jury deliberation room, and leave your instructions and notebooks in the jury room until you come back with a verdict or the deliberations are concluded."

Although the jury was instructed on the meaning of reasonable doubt by a reading of CALCRIM No. 103 before the presentation of evidence, Chavarria faults the trial court for failing to repeat this instruction after the close of evidence. He brings to our attention no case law requiring such a predeliberation instruction to meet federal constitutional standards. The cases he cites all involve a failure to instruct the *sworn jury* on the meaning of reasonable doubt *before or after* the presentation of evidence. (See *People v. Vann* (1974) 12 Cal.3d 220, 225-228; *People v. Flores* (2007) 147 Cal.App.4th 199, 212 [federal constitutional error where prospective jurors were instructed on meaning of reasonable doubt during voir dire, but sworn jury was never given the instruction]; *People v. Phillips* (1997) 59 Cal.App.4th 952, 953-955, 957-958 [federal constitutional error where sworn jury was not instructed on meaning of reasonable doubt or on presumption of innocence, even though other instructions alluded to reasonable

doubt standard of proof]; *People v. Crawford* (1997) 58 Cal.App.4th 815, 819-820, 822-823 [same]; *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1217-1219, 1222-1224 [same]; *People v. Morris* (1968) 260 Cal.App.2d 848, 849-851 [error where jury was provided inadequate instruction on reasonable doubt]; *People v. Soldavini* (1941) 45 Cal.App.2d 460, 463-464 [same]; cf. *People v. Mayo* (2006) 140 Cal.App.4th 535, 541-549 & fn. 5 [where sworn jury was never instructed on meaning of reasonable doubt, no federal constitutional error because other instructions taken as a whole adequately conveyed the concept to the jury]; *People v. Benjamin* (1970) 3 Cal.App.3d 687, 698-699 [harmless error where adequate instruction on meaning of reasonable doubt was given to sworn jury before presentation of evidence, but inadequate instruction given after presentation of evidence].) In this case, the instructions provided before and after the presentation of evidence, taken as a whole, correctly conveyed the concept of reasonable doubt to the jury. (See *Victor v. Nebraska*, *supra*, 511 U.S. at p. 5.) There was no federal constitutional error.

We also conclude there was no error under state law in the trial court's failure to further instruct on the meaning of reasonable doubt and the presumption of evidence at the close of evidence.[3] The trial court has wide discretion as to when to instruct the jury. (§§ 1093, subd. (f), 1094; *People v. Smith* (2008) 168 Cal.App.4th 7, 14-16 [discussing cases] (*Smith*).) "[T]he practice of preinstructing a jury on general principles of law before opening statements has long been recognized by California appellate courts." (*Smith*, at p. 15.) Preinstructions " 'give [the jury] some advance understanding of the applicable principles of law so that they will not receive the evidence and arguments in a vacuum.' [Citation.]" (*Ibid.*) On the other hand, courts have "generally favored giving burden-of-proof-type instructions at the conclusion of the evidence at trial and before the

[3] Although the People point out that Chavarria has forfeited any claim of state law error by failing to squarely raise the issue in his opening brief, we elect to address this issue on the merits.

jury deliberates because it 'places the concepts at center stage for consideration during deliberations' and 'protect[s] an accused's constitutional right to be judged solely on the basis of proof adduced at trial.' [Citations.]" (*Id.* at p. 16.) Challenges to the timing of instructions as an abuse of discretion or a violation of due process are determined based on a review of the instructions as a whole in light of the entire record. (*Ibid.*)

We conclude there was no abuse of discretion.[4] The jury was instructed as to the meaning of reasonable doubt and presumption of innocence at about 10:00 a.m. on the first day of trial. Both the prosecution and the defense rested their cases that afternoon around 3:00 p.m. The court read its closing instructions the following morning and the jury began deliberations at about 11:00 a.m. Jurors had been provided with written sets of the court's initial and closing instructions of law, and were told they could consult these instructions while the attorneys made their closing arguments. Both the prosecutor and defense counsel referred to the reasonable doubt standard in their closing arguments, and jurors were directed to take the written instructions with them to the jury room for use during their deliberations. Given these circumstances, it was not reasonably probable the jury misunderstood the meaning of reasonable doubt or that the defendant was presumed innocent. There was no abuse of discretion in failing to re-read CALCRIM No. 220 after the close of evidence.

II. Prosecutorial Misconduct

Chavarria also claims the prosecutor committed misconduct during cross-examination by asking him questions that sought an opinion on whether prosecution

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[4] Chavarria suggests application of the abuse of discretion standard of review is inappropriate since there is no indication the trial court consciously exercised its discretion to omit CALCRIM No. 220 from the final instructions. Instead, he argues, the omission appears to have been inadvertent error. Even if we were to assume Chavarria is correct, the error would have been harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836, for the same reasons we state above in applying the abuse of discretion standard.

witnesses were lying, invaded the attorney-client privilege, were argumentative, and impugned the integrity of defense counsel.

We begin with the following principle: "A prosecutor's conduct violates a defendant's [federal] constitutional rights when the behavior comprises a pattern of conduct so egregious that it infects ' "the trial with unfairness as to make the resulting conviction a denial of due process." [Citation.]' (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) The focus of the inquiry is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor. [Citation.] Conduct that does not render a trial fundamentally unfair is error under state law only when it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' " (*People v. Mendoza* (2007) 42 Cal.4th 686, 700 (*Mendoza*).) " 'A defendant's conviction will not be reversed for misconduct' that violates state law, however, 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' " (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071.)

" 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' " (*People v. Hill* (1998) 17 Cal.4th 800, 820.) When an objection is sustained and the jury is admonished, it is generally assumed that the jury followed the admonishment and that prejudice was therefore avoided. (See, e.g., *Mendoza, supra,* 42 Cal.4th at pp. 701, 702, 705; *People v. Jones* (1997) 15 Cal.4th 119, 168, overruled on other grounds by *People v. Hill*, *supra*, 17 Cal.4th at p. 822, fn. 1.)

During cross-examination, the prosecutor asked Chavarria how he broke the window to Jimenez's truck and the following colloquy ensued:

"A. I popped out the window.

"Q. You shattered the glass?

"A. No, I didn't shatter it.

"Q. So when Mr. Jimenez testified and Officer –

"A. Uh-huh.

"Q. – Officer Rey Vargas testified that they saw shattered glass –

"A. Uh-huh.

"Q. – their testimony wasn't accurate?

"A. No.

"Q. They weren't telling the truth?

"A. The window was already – it was a square window. All that covered it was a piece of plastic – plastic – cut out of plastic. It was already – there was no window there.

"Q. You didn't tell your attorney that.

"[DEFENSE COUNSEL]: Objection; work product. Confidential.

"THE WITNESS: I didn't break his window.

"THE COURT: Sustained.

"THE WITNESS: It was already broke. No window there to break."

To the question, "You didn't tell your attorney that," defense counsel's objection was sustained. However, no timely objection was made to the argumentative question: "They weren't telling the truth?" Any claim of error is therefore forfeited.

Later in his cross-examination, the prosecutor questioned Chavarria about whether, after exiting Jimenez's vehicle, he raised the saw blade over his head as if he were going to throw it at Jimenez, and the following exchange occurred:

"Q. Okay. How did you hold it?

"A. Tried to put it – put it under my shirt. [¶] . . . [¶]

"Q. Okay. And how were you going to run with that under your shirt, huh?

"A. I – I – I tried to get away from Mr. – Mr. Ramirez [sic], because we had to struggle. And he – when I got out the truck, he grabbed me, and we had – we had a fight – or not a fight, but a struggle, and – and I got away. And I said – and I stopped and I

asked [sic] him, I'll give your all your stuff. Here it is. He said, I don't want my stuff back. All I'm going to do is – you're going to jail – or, you're going to jail – you're – if you – if not, I'm going to – he threatened – he said some words. I don't want to repeat them, because for the general principle I don't want my family involved in it. [¶] So I ran. I ran as far as I could, and he kept chasing me and chasing me. Like he said – he said in his own – like you say – or accusing me – or like using verbal – what – you know, as a district attorney, he's not socially [sic] the best – best person to – to allocate [sic] for or against, but I'm not scared of you."

"Q. Who are you talking to? [¶] Are you talking to me?

"A. No, I'm not. No, I'm not talking to you. I'm talking about the general principle of what Mr. Jimenez had said.

"Q. So you're telling the jury that you and Mr. Jimenez were in a struggle?

"A. Yeah. We changed [sic] verbal – it was not just – not my – my –

"Q. You never told that to your attorney, in front of the jury.

"A. I – I – I spoke to my attorney about that, but he said he didn't want me to admit that or use that, because probable that – that it would be thrown out of court. It would be – it would be thrown out of court, perhaps, or perhaps not. It would sound like not the truth, because I'm from a different area or – or – or –

"Q. Are you telling me that [your attorney] told you not to tell what happened?

"[DEFENSE COUNSEL]: Objection. [¶] Can we approach, Your Honor? This goes to the 245.

"THE COURT: The objection is sustained. It also goes into attorney/client privilege.

"[DEFENSE COUNSEL]: Can we approach?

"THE COURT: Sure.

"[DEFENSE COUNSEL]: This is baloney."

After an unreported bench conference, the prosecutor asked a few closing questions and ended the cross-examination. Defense counsel had no further questions of his client. In his closing argument the following morning, the prosecutor stated, "[B]efore I get started here with my argument, yesterday you may recall that things got a little bit heated and they got heated after some statements were made by the defendant, Mr. Chavarria; and I want to make it perfectly clear to you that I attribute any statements made by the defendant yesterday to the defendant and to the defendant solely, and any of my questions directed at the defendant were directed at him and in no way was I attacking the credibility, the integrity of [defense counsel]. I have worked with [this defense counsel] in this building for many years. I know him to be a man of integrity and I know him to be forthright." The court then stated, "Actually, I can second that. I've worked with [this defense counsel] for many years, and I have found him to be of the utmost integrity."

To the extent Chavarria claims the prosecutor sought to invade the attorney-client privilege in asking the question, "You never told that to your attorney, in front of the jury?" We do not agree. The question might certainly have been more artfully worded. Nevertheless, it appears to reference Chavarria's testimony on direct examination, as opposed to protected conversations he may have had with his attorney. And, although Chavarria seems to have misunderstood the question, the prosecutor never took advantage of the response by pursuing this line of questioning or mentioning it in closing argument.

Finally, defense counsel timely objected to the question, "Are you telling me that [your attorney] told you not to tell what happened?" There was no answer given to this question and the objection was sustained. Chavarria argues that the integrity of his attorney was impugned. Given that both the prosecutor and the court subsequently vouched for the integrity of defense counsel in open court, any negative inference to be drawn from the inquiry was undoubtedly cured.

DISPOSITION

The judgment is affirmed.

STEVENS, J.*

We concur.

SIMONS, ACTING P.J.

NEEDHAM, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.